FILE COPY

Office Supreme Court, U.S.
FILED
OCT 26 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 509

AMBASSADOR HOTEL COMPANY OF LOS ANGELES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN E. HUGHES
JOHN W. HUGHES
HAROLD R. BURNSTEIN
105 West Adams Street
Chicago 3, Illinois
Counsel for Petitioner

October 26, 1960

UNITED STATES LAW PRINTING CO., CHICAGO 38, ILL. (LA Revised 5-6-58)

TABLE OF CONTENTS

	PAGE
Question Presented	2
Statutes Involved	2
Statement of the Case	2
Argument	5
Other Points	8
Conclusion	9
Appendix	13
Exhibit A—Statutes	13
Exhibit B—Opinion of the Court of Appeals	16
Exhibit C—Judgment of the Court of Appeals	25
Exhibit D—Order denying rehearing	26

AUTHORITIES CITED

Cases

Empire Ordnance Co. v. Harrington, 249 F (2d) 680 4, 6

Commissioner v. Gooch Milling & Elevator Co., 320 US 418 4, 6

Hulburd v. Commissioner, 296 US 300 9

Huntington National Bank, 43 TC 760 6

Jones v. Commissioner, 34 BTA 280 6

Swift & Co. vs United States, 282 US 468 5

United States Ex Rel. Girard Trust Co. v. Helvering, 301 US 540 4, 6

Statutes

Internal Revenue Code of 1939

Section 275 11

Section 3807 ..... 2, 3, 4, 5, 7, 8, 9, 11

Internal Revenue Code of 1954

Section 6402 5

Section 6407 ..... 2, 5, 9

Section 7453 1

Miscellaneous

26 C.F.R. 370, Section 473.4(e) 4, 7

90 Cong. Rec. 275-1944 7

1944 C.B. 469 4

72 Harvard Law Review 1225 11

26 U.S.C. 1952 ed. 2

28 U.S.C. 1254(1), 62 Stat. 928 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

AMBASSADOR HOTEL COMPANY OF LOS ANGELES,

Petitioner,

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner petitions that the writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered in the above case, reported in 280 F.(2d) 293 (App. p. 16), on June 10, 1960, affirming a decision of the Tax Court published in 32 TC 208. (R. p. 39). Rehearing was denied August 1, 1960. (App. p. 26). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), 62 Stat. 928.

QUESTION PRESENTED

Has the Tax Court of the United States jurisdiction to allow a refund? If so, does the mere order of the Tax Court determining an overpayment *ipso facto* constitute the allowance of a refund?

STATUTES INVOLVED

Section 3807 (26 U.S.C. 1952 edition) is set forth in the appendix at page 13. The crucial words thereof are:

> "If *under a determination* in respect of a tax imposed by Chapter 1 or Chapter 2 a deficiency is assessed or *a credit or refund of an overpayment is allowed.*" (Italics ours)

Section 6407 (26 U.S.C.) reads:

> "The date on which the Secretary or his delegate first authorizes the scheduling of any overassessment in respect of any internal revenue tax shall be considered the date of the allowance of the refund or credit in respect of such tax."

STATEMENT OF THE CASE.

This case involves a deficiency of $33,290.61 in federal income tax (not profits tax) for petitioner's taxable year ended January 31, 1944.

Petitioner's income tax return for the period here involved was filed on April 14, 1944.

The general three year statute of limitations expired on April 14, 1947.

On December 29, 1955, over 8 years after it expired and over 11 years and 8 months after petitioner's return was filed, the notice of deficiency herein was mailed to it.

Petitioner duly filed a petition with the Tax Court alleging (R. 6):

"The respondent erred in failing to hold the assessment of additional income tax for the period ended January 31, 1944 was barred by the statute of limitations."[1]

Respondent filed an answer in which, after denying this allegation of error, he "further" alleged as an affirmative defense "that the period of time within which an assessment could properly be made had not expired under the provisions of Section 3807." (R. 13)

Petitioner filed a reply expressly denying this allegation (R. 14). After trial and filing of briefs, respondent moved to file an amended answer to spell out in greater detail the Section 3807 defense (R. 15, 16) which motion was denied (R. 4).

The Tax Court, in an opinion not reviewed by that court, held (R. 52) "here *such refund* of an overpayment *was allowed by this court* in its aforementioned final decision of April 12, 1955." (Italics ours) The decision referred to is set forth at page 43 of the record and merely determines an overpayment. The Tax Court also found this essential fact (bottom p. 42, top p. 43):

"In said decision refund of an overpayment in petitioner's excess profits tax for said taxable year was allowed."

If this Tax Court decision finding an overpayment (R. 43) does not show its refund is allowed, then it must be conceded the above quoted essential finding and conclusion of the Tax Court is wrong on its face. The case is as simple as that.

The ground of the Court of Appeals affirmance of the Tax Court necessarily must be the assumption of that

[1] The court will note this plea does not specify any particular section of the statute of limitations.

court that the said Tax Court's order finding an overpayment *ipso facto* allows its refund. Whether it does or does not is the only question presented here. If it does not the decision below cannot stand because Section 3807 expressly states it only applies "if" a refund was allowed.

REASONS FOR GRANTING THE WRIT

The court below "has decided a federal question in a way in conflict with applicable decisions of this court."

Essential to sustain its decision is its holding a refund was allowed by the Tax Court. This is directly contrary to *United States Ex Rel. Girard Trust Co.* v. *Helvering*, 301 US 540, 542 and the holding in *Commissioner* v. *Gooch Milling & Elevator Co.*, 320 US 418 at page 420, that the Tax Court "has no power to order a refund or credit should it find an overpayment."

A Court of Appeals decision to the same effect, in conflict with that of the court below is *Empire Ordnance Co.* v. *Harrington*, 249 F(2d) 680 at page 682.

These decisions, squarely on the issue, were cited to the Court of Appeals and wholly ignored by it—certainly a departure "from the accepted and usual course of judicial proceedings."

Also the decision below is directly contrary to an example given in a contemporaneous Treasury Regulation of 15 years standing which has during that time necessarily been relied upon by the Treasury in assessing taxes. See 26 C.F.R. 370, Section 473.4(e) and C.B. 1944, example 1. top p. 469.

Finally with millions of tax returns filed annually questions of limitation are of obvious importance.

ARGUMENT.

It must be conceded, as Section 3807 plainly says, allowance of a refund of the overpayment of profits tax found in the prior case is essential to extend the 3 year general period of limitation.

The essential Tax Court finding appears at page 42 of the record and reads:

> "In said decision refund of an overpayment in petitioner's excess profits tax for said taxable year was allowed."

This is manifestly and unquestionably wrong "which no body can deny" because the said decision is also set forth in the Tax Court findings at page 43 of the record and shows on its face it does not allow a refund but merely finds an overpayment. It does not and could not allow the refund of this overpayment. This the Tax Court lacks jurisdiction to do. The only person authorized by statute to allow a refund is "The Secretary or his delegate" (Section 6402 Title 26 U.S.C.) and Section 6407 says the date of its allowance is the date the Secretary or his delegate signs the schedule. (*Cf. Swift & Co. v. United States*, 282 US 468).

We cited to the court below the holding of this Court in *United States Ex Rel. Girard Trust Co. v. Helvering*, 301 US 540, 542:

> "The Board has not ordered a refund. It could not rightly do so for its jurisdiction is limited to the determination of the amount of deficiency or overpayment."

The court below ignored this case which is certainly a departure from the usual course of judicial appellate proce-

dure with respect to decisions of this Court. One so glaring that counsel, in many years practice, recall no other such instance.

In *Commissioner* v. *Gooch Milling Co.*, 320 US 418, this Court said at page 420:

> ". . . it has no power to order a refund or credit should it find an overpayment."

Therefore, it is plain the conclusion that the Tax Court's order finding an overpayment *ipso facto* allowed its refund is wrong on its face and cannot stand.

See also *Empire Ordnance Co.* v. *Harrington*, 249 F(2d) 680 at page 682, which points out the jurisdiction of the Tax Court is still the same. And the statute as to jurisdiction has not been changed since the year 1936 involved in this Court's decision in the *Gooch Milling* case.

The opinion of the Tax Court in the case at bar was not reviewed by the full court. In *Jones* v. *Commissioner*, 34 BTA at p. 283, (opinion by present presiding Judge) it is said:

> "Credit or refund are matters over which the Board has no jurisdiction whatsoever."

In *Huntington National Bank*, 13 TC 760, it is said at page 773, this is "well settled."

Statutes provide for payment of interest on refunds whether made as a result of court order or otherwise and that is one reason the Code fixes the date they are "allowed" as the date on which the Secretary or his delegate authorizes the schedule of the overpayment. Also, it is one important reason the Code authorizes only the Secretary or his delegate to allow them.

If he has allowed a refund, it is peculiarly within the knowledge of the Service which can easily prove it. Before

the Tax Court it was never even claimed and never even attempted to be pleaded by respondent in his amended answer (R. 16) that a refund was allowed, probably because he felt it was not. It was not stated in the notice of deficiency a refund had been allowed. Also, respondent did not contend before the Tax Court that the Tax Court finding of an overpayment in the prior case *ipso facto* allowed its refund and would hardly have done so in view of this example in his regulation promulgated contemporaneously under Section 3807 and for over 15 years relied upon.

The example in Reg. Sec. 473.4 (1944 C.B. p. 468) reads as follows:

> "*Example.* Corporation X on March 15, 1941, filed a return and paid a tax as a personal holding company for the calendar year 1940. The period of limitations provided in section 322 upon filing a claim for refund of such personal holding company tax expired on March 15, 1944. The Commissioner within the applicable period of limitations asserted a deficiency against Corporation X in respect of the excess profits tax for such taxable year. On March 1, 1946, it was determined under a decision of The Tax Court of the United States that Corporation X was not a personal holding company and was therefore subject to excess profits tax. Such excess profits tax was assessed on May 1, 1946. Under the provisions of section 3807, Corporation X may file a claim for refund of the personal holding company which it paid, or credit or refund may be allowed or made if no claim is filed, as if the period of limitations upon filing claim for credit or refund, or the allowing of credit or refund if no claim is filed, did not expire until May 1, 1947."

Furthermore, the legislative history supports the example in the regulation because it shows Section 3807 as added by the Senate (90 Cong. Rec. 275, 1944) made the Tax Court's determination enough but the Conference Committee changed it to the form in which it was enacted and which expressly requires that a refund be allowed, probably to help pay the deficiency.

OTHER POINTS

While the foregoing is enough, other points showing the decisions below are clearly wrong are that besides requiring a refund, Section 3807 also requires, before it can apply among other things, a showing that (Section 3807(b)(2) "the application of the law and facts determined in the ascertainment of such overpayment to any other tax of the taxpayer under Chapter 1 or Chapter 2 for the same taxable year would result in an increase or decrease in the amount of the tax previously determined." The Tax Court held:

> "The decision, as shown on its face, was based on the opinion of this court in the above mentioned case (filed Oct. 29, 1954 and reported at 23 T.C. 163) in which one of the issues pertained to the amount of excess profits credit allowable to the petitioner." (R. 44)

A reading of the prior opinion (23 TC 163), shows this was not one of the issues decided therein.

The Court of Appeals states "a reduction of excess profits tax *ipso facto* resulted in a correlative increase of income tax liability." It repeats this thought twice more in its opinion. This is plain error. Income and tax on it in the prior case (23 TC 163) were reduced because respondent erroneously included in income, profit from purchase of bonds. This sum did not become subject to income tax because the Tax Court held consent to reduce basis by its amount was valid and in such case the Code excludes it from income tax also.

Furthermore, Section 3807 (c) expressly requires "changes shall be made in items which are the subject of such determination and in items which are affected thereby and in no others."

CONCLUSION.

Among the decisions in thousands of tax cases this Court has seen or will see, it is doubtful if it has or will ever see one so obviously, patently and clearly wrong on its face as this one.

In case of a deficiency found by the Tax Court, Section 3807 requires not only that one be found but also that it be assessed. Only the Secretary or his delegate can do that. See title 26 U.S.C. Sec. 6201(a).

The crucial words of Section 3807 requiring a refund before it can apply are:

> "If under a determination in respect of a tax imposed by Chapter 1 or Chapter 2 a deficiency is assessed or a credit[*] or *refund of an overpayment is allowed.*" (Italics ours)

The Tax Court's crucial finding (R. 42) "in said decision refund of an overpayment . . . was allowed" (R. 43) and "the refund of overpayment allowed in said decision" (R. 52) is clearly wrong on its face because said decision (R. 43) itself shows it merely determined an overpayment. Under decisions of this Court that is all the Tax Court had jurisdiction to do. It did not and could not allow its refund. See title 26 U.S.C. Sec. 6402.

As plainly as English language can do, the last quoted statute not only requires the "determination" of an "overpayment" but further expressly requires that "under a determination" of an overpayment "a refund is allowed." The only person in the United States authorized to allow a refund is "the Secretary or his delegate" (Section 6402 IRC) and the Revenue Code itself does not leave the date a refund or credit is allowed in doubt but Section 6407

---

[*] Credits and refunds differ. Both carry interest but to different dates (Code Sec. 6611). The Tax Court did not find a credit was allowed. It found a "refund." (R. 42, 44, 52) Only the Tax Court can find facts: *Hulburd* v. *Comm.*, 296 US at p. 306.

quoted on page 2 hereof, thereof specifically states it is the date the Secretary or his delegate signs the schedule.

Not only is the crucial finding of the Tax Court that its order of overpayment allowed "refund of an overpayment" unquestionably wrong on its face, but the conclusion of the Court of Appeals that the one year period "includes the date of determination by the Tax Court that taxpayer is entitled to either a credit or a refund" (App. p. 22) assumes without discussion the crucial point on which the case turns, *i.e.* that the Tax Court order determined the taxpayer was "entitled to a refund." This it did not do.

These reasons mentioned in the rules of this Court exist for granting the writ. First, in so deciding this federal question, the Court of Appeals is squarely in conflict with the two decisions of this Court quoted from on page 4 hereof.

The second reason for granting the writ, mentioned in the rules of this Court is this. When a decision of this Court squarely on point is cited to a Court of Appeals and that decision is never mentioned by that court, such court has "so far departed from the accepted and usual course of judicial proceedings" as to warrant an admonition by this Court to pay attention to its decisions.

A third reason mentioned in the rules of this Court for granting the writ exists here—conflict with a decision of another circuit on whether an order of the Tax Court allows a refund.

A fourth reason is that the decision below is contrary to the example in the contemporaneous Treasury Regulation of over 15 years' standing which must have been relied on during that long period of time.

And a fifth reason is the last report of the Commissioner which shows 93 million income tax returns were filed the preceding year and obviously statutes of limitation are of greater importance.

For any one of the foregoing reasons the writ should be granted.[3]

All of which is respectfully submitted.

JOHN E. HUGHES
JOHN W. HUGHES
HAROLD R. BURNSTEIN
Counsel for Petitioner

October 26, 1960.

---

[3] In 72 Harvard Law Review at 1225, it is said: "Tax cases one understands are not the favored fare of most of the federal judiciary," and at p. 1220, "Whatever the judge may see in the tax cases, tax cases give an almost unrivalled view of the judge."

APPENDIX

EXHIBIT A

Internal Revenue Code of 1939:

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

SEC. 3807 [as added by sec. 513(a) of the Revenue Act of 1943, *supra*][1]. PERIOD OF LIMITATIONS IN CASE OF RELATED TAXES UNDER CHAPTER 1 AND CHAPTER 2.

(a) *Definitions.*—As used in this section—

(1) The term "tax previously determined" shall have the meaning assigned to such term by section 3801(d).

(2) The term "the same taxable year" shall include any taxable year which coincides in whole or in part with the taxable year for which the determination referred to in subsection (b) is made.

(b) *Extension of Period of Limitations.*—If—

(1) under a determination in respect of a tax imposed by Chapter 1 or Chapter 2, a deficiency is assessed or a credit or refund of an over-payment is allowed, within the period of limitations properly applicable thereto, and

[1] By Section 513(b) of the 1943 Act, Section 3807 was made applicable to all taxable years beginning after December 31, 1939.

(2) the application of the law or facts determined in the ascertainment of such deficiency or overpayment to any other such tax of the taxpayer under Chapter 1 or Chapter 2 for the same taxable year would result in an increase or decrease in the amount of the tax previously determined in respect of such other tax, and

(3) on any date prior to the expiration of one year from the assessment of a deficiency or the allowance of a credit or refund in respect of the tax referred to in paragraph (1), the assessment of a deficiency or the allowance of a credit or refund in respect of the tax referred to in paragraph (2) is prevented (except for the provisions of section 3801 or 734) by the operation (whether before, on, or after the date of enactment of the Revenue Act of 1943) of any law or rule of law other than this section and other than section 3761 (relating to compromises),

then upon such date the increase or decrease in the tax referred to in paragraph (2) shall be considered a deficiency or an overpayment, as the case may be. Such deficiency may be assessed and collected or such overpayment may be credited or refunded as if on the date the deficiency is assessed or the credit or refund allowed in respect of the tax referred to in paragraph (1) one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund in respect of the tax referred to in paragraph (2) for the same taxable year.

(c) *Adjustment Unaffected by Other Items, Etc.*—In determining whether an increase or decrease in the amount of the tax previously determined shall be cor-

sidered to result from the application of the law or facts under a determination referred to in subsection (b)(1) changes shall be made in items which are the subject of such determination and in items which are affected thereby, and in no others. The amount which may be assessed or allowed as a credit or refund under subsection (b) shall not be diminished by any credit or set-off based upon any item which was not the subject of such determination or affected thereby. Such amount, if paid, shall not be recovered by a claim or suit for refund or suit for erroneous refund based upon any item which was not the subject of such determination or affected thereby, except in connection with a subsequent application of this section.

(26 U.S.C. 1952 ed., Sec. 3807.)

Internal Revenue Code of 1954:

SEC. 7453. RULES OF PRACTICE, PROCEDURE AND EVIDENCE.

The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the rules of evidence applicable in trials without a jury in the United States District Court of the District of Columbia.

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Ambassador Hotel Company of Los Angeles,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.

No. 16,589
June 10, 1960

On Petition for Review of Decision of the Tax Court of the United States

Before CHAMBERS and STEPHENS, Circuit Judges and MATHES, District Judge.

MATHES, District Judge.

This is a taxpayer's petition to review a decision of the Tax Court upholding the Commissioner's determination of a deficiency. *Ambassador Hotel Co. of Los Angeles* v. *Commissioner*, 1959, 32 T.C. 208. The jurisdiction of this Court is invoked under 26 U.S.C. § 7482(a).

The facts are undisputed. Both income tax and excess profits tax were assessed to the taxpayer for its tax year ending January 31, 1944, the excess-profits tax assessment having been made pursuant to §§ 710 and 711 of the 1939 Internal Revenue Code. [26 U.S.C. §§ 710 and 711 (1939), repealed by 59 Stat. 568 (1945).] Challenging the excess-profits tax assessment for that year, petitioner sought a redetermination in the Tax Court. This attack upon the excess-profits tax assessment was successful, and

April 12, 1955, the Tax Court entered a final order in favor of the taxpayer. Specifically, this order determined that petitioner was entitled to a refund or credit of $83,226.54[1] for overpayment of excess profits tax. *Ambassador Hotel Co. of Los Angeles* v. *Commissioner*, 1954, 23 T.C. 163, 168-169.

By virtue of the provisions of the 1939 Code, a reduction in excess profits tax ipso facto resulted in a correlative increase in income tax liability, since the pattern established by the 1939 Code made the two taxes directly interrelated through the so-called "two-basket" approach. Under this approach, the entire taxable income was divided into two segments, one taxed at the income tax rate, and the other at the higher excess profits rate. Hence a redetermination which operated to change the amount or size of one segment resulted, by operation of law, in a corresponding change in the amount or size of the other. [See 26 U.S.C. §§ 710-731 (1939), repealed by 59 Stat. 568 (1945); see also 10 Mertens, Law of Federal Income Taxation § 57.77 at 128, n. 85 (Rev. ed. 1958).]

In keeping with this pattern for dividing the taxable income for income and excess profits tax purposes, the Commissioner, after the Tax Court's determination that there had been an overpayment of excess profits tax, proceeded to determine the correlative increase in petitioner's income tax liability and the resultant deficiency in petitioner's income tax for the tax year involved. On December 29, 1955, within a year following the date of the Tax Court's order, the Commissioner sent a ninety-day letter to petitioner, thereby giving notice of this income tax deficiency for the tax year ending January 31, 1944.

---

[1] Corrected to $26,475.54 — see App. p. 26.

Inasmuch as the general three-year statute of limitations had already run on the deficiency [see 26 U.S.C. § 275(a) (1939)], the Commissioner added to the customary provisions of the ninety-day letter the statement that "the deficiency of income tax * * * is assessable under the provisions of section 3807 of the Internal Revenue Code of 1939 (relating to period of limitations in case of related taxes under Chapter 1 and Chapter 2)."

The taxpayer thereafter filed with the Tax Court a timely petition seeking a determination that the deficiency assessment was not owing because time barred. [See 26 U.S.C. § 275(a), *supra*.] The Tax Court held that the burden of proving facts to show that the general three-year period of limitations was not here extended by virtue of § 3807 of the 1939 Code [26 U.S.C. § 3807] rests upon the taxpayer and not upon the Commissioner and, finding that this burden had not been met, the Tax Court upheld the Commissioner. In reaching this decision, the Tax Court ruled that § 3807 of the 1939 Code was repealed only with respect to those taxable years ending after June 30, 1950. *Ambassador Hotel Co. of Los Angeles v. Commissioner*, *supra*, 32 T.C. 208.

Insofar as now pertinent, § 3807 of the 1939 Code provides that:

> "(b) Extensions of Period of Limitations. If—
>
> "(1) under a determination in respect of a tax imposed by Chapter 1 or Chapter 2, a deficiency is assessed or a credit or refund of an overpayment is allowed, within the period of limitations properly applicable thereto, and

"(2) the application of the law or facts determined in the ascertainment of such deficiency or overpayment to any other such tax of the taxpayer under Chapter 1 or Chapter 2 for the same taxable year would result in an increase or decrease in the amount of the tax previously determined in respect of such other tax, and

"(3) on any date prior to the expiration of one year from the assessment of a deficiency or the allowance of a credit or refund in respect of the tax referred to in paragraph (1), the assessment of a deficiency or the allowance of a credit or refund in respect of the tax referred to in paragraph (2) is prevented * * * by the operation (whether before, on, or after the date of enactment of the Revenue Act of 1943) of any law or rule of law other than this section

* * *

"then upon such date the increase or decrease in the tax referred to in paragraph (2) shall be considered a deficiency or an overpayment, as the case may be. Such deficiency may be assessed and collected or such overpayment may be credited or refunded as if[,] on the date the deficiency is assessed or the credit or refund allowed in respect of the tax referred to in paragraph (1) [,] one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund in respect of the tax referred to in paragraph (2) for the same taxable year."

The petition to review stands upon two grounds. First, that the burden of proof as to applicability of § 3807 was erroneously placed upon the taxpayer to petitioner's prejudice since, it [laid upon the Com-

missioner as should have been done, the record discloses that the burden has not been met; and second, that in all events repeal of § 3807 by § 304(c) of the Revenue Act of 1950 operated retroactively as a repeal for all taxable years, and not merely prospectively for the years subsequent to 1950.

Analysis reveals that petitioner's burden-of-proof contention raises nothing more than a question of law, namely, whether or not the undisputed facts at bar supply the requisite elements necessary to bring § 3807 into operation, thus making timely the Commissioner's assessment of income tax deficiency. And since the answer turns wholly upon the proper construction of § 3807 of the 1939 Code, we need not reach the burden-of-proof question.

Petitioner urges that the event referred to in § 3807, as fixing the date on which a credit or refund is "allowed" to provide the one-year extension, is allowance by the Commissioner himself, *i.e.* authorization of the necessary bookkeeping entry by the Secretary or his delegate. [See 26 U.S.C. §§ 6402 and 6407 (1954).] Specifically the argument is that, inasmuch as there is nothing in the record to indicate that the Commissioner "allowed" the excess-profits tax refund in question, one operative fact necessary to bring § 3807 into play is lacking here. The Commissioner, on the other hand, contends that a credit or refund is "allowed", within the meaning of § 3807, when the Tax Court determines that there was an overpayment as to one tax giving rise ipso facto to a deficiency as to the other tax. [See 26 U.S.C. § 322(c) and (d) (1939).]

Although there is some dispute in the commentary and legislative history bearing on the proper construction of § 3807 as regards this particular point [compare 26 C.F.R. 370 § 473.4(e), Example No. 1 with H.R. Rep. No. 1079, 78th Cong., 2nd Sess. 75 (1943); see 10 Mertens, Law of Federal Income Taxation, *supra*, § 57.77 at 132], both reason and the obvious policy which prompted the enactment lend firm support to the Commissioner's construction of the verb "allowed" as used in § 3807.

Admittedly § 3807 was enacted in recognition of the fact that the 1939 Code provided a direct interrelationship between the excess profits tax and the income tax [see 26 U.S.C. § 26(c) (1939), as amended by 56 Stat. 806 and 58 Stat. 53 (1942), repealed by 59 Stat. 570 (1945)], such that when, as at bar, a redetermination decreases the excess profits tax, a correlative increase in income tax ipso facto results. Recognizing the clear likelihood that the general three-year period of limitations provided in § 275(a) might run as to one tax while the other was being redetermined through litigation, the Congress created in § 3807 a particular, and in effect an additional, one-year period during which an adjustment could be made and steps taken to enforce it after the three-year period had already run. As Senator George commented during debate upon the bill: "The proposed amendment is designed to provide reciprocal treatment to taxpayers and to the Government, under which the effect upon one tax of adjustments in another tax may be properly made. It would thereby avoid inequitable results possible under the present law." 90 Cong. Rec. 275 (1944).]

[1] Thus legislative history permits and underlying policy compels the conclusion that the date of allowance within the meaning of § 3807 includes the date of a determination by the Tax Court that a taxpayer is entitled to either a credit or a refund. This construction results in the added one-year period of limitation provided in § 3807 commencing by operation of law; whereas that urged by petitioner would permit the Commissioner, always an interested party to any tax controversy, in effect to control the date of commencement of the one-year period. [*Cf. Fellerson v. United States*, D.C.S.D. Cal. January 21, 1960, 28 U.S.L. Week 2372]. To construe the statute as petitioner urges would be in derogation of the wise public policy, which underlies all statutes of limitation, to put an end to the possibility of litigation after the lapse of a reasonable and predeterminable period of time. See: *Guaranty Trust Co. of New York v. United States*, 1938, 304 U.S. 126, 136, 58 S.Ct. 785, 82 L.Ed. 1224: *Bailey v. Glover*, 1879, 21 Wall. 342, 88 U.S. 342, 349-350, 22 L.Ed. 636.

[2] The record before us shows beyond dispute that here there was:

(1) A timely allowance of a credit or refund [26 U.S.C. § 3807(b)(1), *supra*]; and

(2) An "application of the law or facts * * * in the ascertainment of such * * * overpayment" in excess profits tax, which resulted in an increase in the amount of income tax as previously determined [26 U.S.C. § 3807(b)(2) and § 26(c), *supra*]; and

(3) The deficiency in income tax arising as a result of the Tax Court's determination of excess profits tax overpayment is otherwise barred by the general three-year statute of limitations [26 U.S.C. § 3807(b)(3) and § 275(a), *supra*].

It follows then that all the requisite facts are present at bar to bring § 3807 into operation to provide an additional year from the date of the Tax Court's determination of the overpayment of excess profits tax within which to assess the income tax deficiency.

Turning now to the second ground for reversal urged by petitioner, namely, that the repeal of § 3807 by § 304(c) of the Revenue Act of 1950 amounted to a repeal for tax years prior, as well as subsequent, to 1950. Section 304(c) provides *inter alia* that:

> "Section 3807 of such [1939] code (relating to period of limitations in case of related taxes under chapter 1 and chapter 2) is repealed."

Section 304 embodies a series of "Technical Amendments" to the 1939 Code. Each of the series employs the term "amended", with the single exception of subsection (c)[1] where the term "repealed" appears. Subsection (g) of § 304 declares:

> "The amendments made by this section shall be applicable with respect to taxable years ending after June 30, 1950."

---

[1] Corrected to (c) App. p. 26.

Inasmuch as subsection (c) uses "repealed" instead of "amended", petitioner argues that subsection (c) is not qualified by subsection (g) so as to be applicable only for the years after 1950, as are the other subsections, even though all the subsections literally contain amendments.

This argument is entirely lacking in merit. The title to § 304 is "Technical Amendments", and the section appears to encompass all the subsections within it. Moreover, when confronted with any question as to the applicability of § 3807 in the cases reported since the Revenue Act of 1950 was enacted, the courts have consistently considered the section as remaining in effect for all tax years ending before June 30, 1950. [*Merrimac Hat Corp.* v. *Commissioner*, 1959, 32 T.C. 1082; *Morrisdale Coal Mining Co.* v. *United States*, 1956, 142 F. Supp. 930, 932-933, 135 Ct. Cl. 483, 485-488; *Pine Hill Crystal Spring Water Co.* v. *United States*, D.C.S.D. N.Y. 1954, 121 F. Supp. 480, 482; accord, 10 Mertens, Law of Federal Income Taxation, *supra*, § 57.77 at 128.]

For the reasons stated, the decision of the Tax Court is affirmed.

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Ambassador Hotel Company of Los Angeles, a corporation, *Petitioner*, vs. Commissioner of Internal Revenue, *Respondent*.	No. 16,589

JUDGMENT

Petition to review a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of the record from the Tax Court of the United States, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the decision of the said Tax Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment
Filed and entered: June 10, 1960
Frank H. Schmid, Clerk

EXHIBIT D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Ambassador Hotel Company of Los Angeles, *Petitioner,* vs. Commissioner of Internal Revenue, *Respondent.*	No. 16,589

On Petition for Rehearing

Before: Stephens and Chambers, Circuit Judges, and Mathes, District Judge

Per Curiam:

The suggestion for a rehearing en banc is rejected.

The opinion is amended by inserting "26,475.54" in lieu of "$83,336.54" at page 1 of the slip sheet, line 11 of the second paragraph, and by inserting "subsection (c)" in lieu of "subsection (e)" at page 6 of the slip sheet, line 3 of the second full paragraph.

The petition for rehearing is denied.

/s/ Albert Lee Stephens

/s/ Richard H. Chambers
United States Circuit Judges

/s/ Wm. C. Mathes
United States District Judge

(Endorsed) Filed
August 1, 1960
Frank H. Schmid, *Clerk*